

DATE: January 5, 1998

CASE NO: 95-INA-143

In the Matter of:

WASHINGTON STATE DEPARTMENT OF FISHERIES,
Employer,

on behalf of

MOHAMAD HASAN HIJAZI,
Alien,

Before: Guill, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

ORDER OF REMAND

This case arises from the Washington State Department of Fisheries' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182 (a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted all regulations cited in this decision are in Title 20.

Under §212 (a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined or certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 28, 1993, Employer filed a Form ETA 750 Application For Alien Employment Certification with the Washington State Employment Security Department ("WSESD") on behalf of the Alien, Mohamad Hasan Hijazi. AF 10. The job opportunity was listed as Structural/Civil Engineer and required a B.S. in Civil Engineering with three years of experience as a Civil Engineer. *Id.* The special requirements of the job were:

One of the three years experience . . . must include concrete design and analysis. Must have completed 2 years Master's level or equivalent course work including research in theoretical design and practical application of reinforced concrete technology. The course work must include classes in: Advanced reinforced concrete design, precast concrete structures, design of steel and concrete bridges, and structural dynamics. Research in enhancing concrete strength and durability is required. AF 10, 12.

WSESD requested more information from Employer on June 9, 1993. AF 167. Specifically, they requested: that the wage rate be amended to the prevailing wage; whether the job required a P.E. license; a copy of the job specifications for the position; and that Employer "provide evidence of recruitment from the Department of Personnel registers including a copy of the registers having applicant names or statement from Dept. of Personnel confirming a lack of applicant names." AF 169. Employer responded on July 6, 1993, in which it amended the wage rate to \$36, 132.00 per year as requested by WSESD, and included a letter from Donald Bartlett, the Chief Engineer, with a copy of the state salary schedule. AF 128-129, 162, 166, 178-184, 10.

WSESD stated that the recruitment period had ended on August 31, 1993, and forwarded 28 resumes to Employer. AF 142-145. Employer submitted its Report of Recruitment on October 15, 1993, which included a letter from Employer's attorney and a report of the Results of Recruitment from Mr. Bartlett. AF 185-195, 133. The attorney letter described the recruitment process and averred that the requirements of the position are necessary based upon the needs of the department as determined by Mr. Bartlett. AF 185-186. She further argued that the requirements are based upon business necessity as specific coursework and theoretical experience are often required in highly specialized fields. AF 186. The Results of Recruitment report stated that none of the applicants were qualified for the position. AF 133. The Report described the

requirements of the position, the qualifications of the Alien, the methodology of recruitment and the reasons for rejecting the 28 applicants. AF 133, 187-195.

WSESD sent a State Agency Transmittal of Application to the CO, dated December 15, 1993. AF 131. The State Representative stated that Employer had not submitted proper documentation in regard to their request for the Personnel Register as Employer had provided only the Affirmative Action List. *Id.* She also questioned the minimum requirements of the job as they differed from the Washington state specifications for Civil Engineer II which was the class for which Employer was recruiting. *Id.* Furthermore, she asserted that Employer did not put forth a good faith effort at recruitment based upon the time lapse before contact with applicants and recommended denial of alien labor certification. *Id.*

The CO issued a Notice of Findings ("NOF"), proposing to deny alien labor certification. AF 115. The CO found that Employer's stated minimum requirements contradicted the State's requirements for a Civil Engineer II. AF 116. The CO required that Employer either justify the restrictive requirements or readvertise. AF 117. Additionally, the CO questioned the rejection of four of the applicants, which she found may have been qualified. AF 118-119. Employer was therefore required to contact and interview the four applicants and if rejected give lawful, job-related reasons for their rejections. AF 120. Next, the CO contended that Employer had not shown good faith recruitment efforts because it had not contacted applicants until after October 1, 1993, when the resumes were sent September 1, 1993, and therefore did not reject the workers for lawful, job-related reasons. *Id.* The CO required Employer to document that it attempted to contact the U.S. applicants in a timely manner. *Id.* The CO also averred that Employer had failed to provide documentation concerning the Washington Department of Personnel registers. *Id.* In this regard, the CO demanded "evidence of recruitment from the Department of Personnel registers, and must include a copy of the register having applicant[']s names or a statement from the Department of Personnel confirming a lack of applicant names." AF 120-121. In conclusion, the CO required "thorough and convincing evidence as to why the employer's recruitment practices should not be viewed as a dissuading influence to qualified applicants in pursuing the job opportunity." AF 121.

Employer filed its Rebuttal of Notice of Findings ("Rebuttal Letter") in a letter dated March 2, 1994. AF 65. Besides the Rebuttal Letter from Mr. Bartlett, the rebuttal included: a Memorandum of Points and Authorities; a letter from Richard Shea, a Personnel Analyst from the Washington State Department of Personnel with various Civil Engineer classifications; a letter from Mr. Bartlett, explaining the why the requirements are necessary with a list of concrete-related projects by the Alien; a letter from Loren Stern, Assistant Director, Management Services, for Employer, in support of the minimum requirements for the job; a letter from Sandra Turner, of the Employee Services Department of Employer concerning the recruitment process and including sample Employer job announcements; a letter from James Peek, Assistant Chief Engineer, also about the recruitment process; the course lists for Walerian Domanski, Huali Geng, Abhay Taylor, and Tatyana Krasnokutskaya; and a letter describing the requirement that all applicants with degrees from outside the U.S. have their transcripts evaluated by an evaluation service. AF 32-114.

The CO issued a Final Determination ("FD") denying alien labor certification on August 10, 1994. AF 22. The CO found that Employer had adequately rebutted the NOF finding that the job requirements were unduly restrictive. AF 25. The CO also found that U.S. workers were not dissuaded by the Employer's untimely interviews. AF 29. The CO proceeded to deny labor certification because "no bona fide job was open to U.S. workers in this case." AF 30. In support of this finding, the CO indicated that Employer recruited for a register for a Civil Engineer II (which has lesser qualifications) and claimed it could not open a register for a Structural Engineer because no funds were budgeted for the position since the Alien was already filling the position as a permanent employee and could not announce a job when it was already filled by the Alien, who is a permanent employee. *Id.*

Employer filed a Motion to Reconsider on September 13, 1994. AF 4. Employer argued that it did not have a chance to respond to whether a bona fide job opportunity was open because it was first raised in the FD. AF 5. Employer also avers that it made a good faith effort to recruit workers and that the FD did not respond to Employer's rebuttal. AF 6-8. The CO denied the Motion to Reconsider on November 8, 1994. AF 1. He found that:

there was a lack of good faith effort to recruit U.S. workers. The legitimate questions raised by the State and this Department on the employer's recruitment practices were not adequately addressed by the employer. Because of the deficiencies in the recruitment process and the failure of the employer to provide requested information, the Department of Labor concludes that there is no bona fide job opening. AF 3.

The CO filed the only Brief in this case on January 18, 1995.

DISCUSSION

Employer adequately rebutted that the minimum requirements were the actual requirements of the job and that U.S. workers were not dissuaded by the untimely interviews. AF 25-29. The CO denied alien labor certification based upon the lack of a bona fide job opportunity. AF 30. The NOF does not raise the issue of the lack of a bona fide job opening. The NOF found deficiencies under 20 C.F.R. §656.21(b)(2) & (6), for: unduly restrictive requirements; rejection of U.S. workers for reasons that were not lawful, job-related reasons; a lack of good faith recruitment; and not providing a copy of a register from the Personnel Department. The lack of a bona fide job opportunity relates to §656.21(b)(8), which requires an Employer to show that the "job opportunity has been and is clearly open to any qualified U.S. worker." *See also Amber Corp.*, 87-INA-545 (Oct. 15, 1987)(en banc)(citing *Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor*, Case No., CV-83-5516-AA H(T), *Slip op.* (C.D. Cal. March 26, 1984)). The CO cannot raise a determinative issue for the first time in the FD as was done in this case. *See* 20 C.F.R. §656.25(c); *Tarmac Roadstone*, 87-INA-701 (Jan. 4, 1989)(en banc); *Clarkston Medical Group*, 87-INA-718 (Oct. 18, 1988).

Accordingly, Employer has not had an adequate opportunity to respond to this issue raised for the first time in the FD and the case should be remanded for clarification on the bona fide job issue so Employer can respond.¹

IT IS THEREFORE ORDERED that this case is remanded pursuant to 20 C.F.R. §656.27(c)(3), to the CO to allow Employer an opportunity to respond to the issue not raised in the NOF. If the CO again denies labor certification, the Employer and Alien shall have 35 calendar days from the date of such denial to request review, following the procedures set forth in the Final Determination. *Meriko Tamaki Wong*, 90-INA-407 (Jan. 27, 1990).

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

Date:
San Francisco, California

¹ If the Employer is contending that the Alien cannot be removed from his position because he has permanent civil service status under Washington State law and regulations, labor certification must be denied because there is not a bona fide job opportunity. The Immigration and Nationality Act's requirements for alien labor certification cannot be thwarted by the requirements and personnel practices of the State of Washington. U.S. CONST. art. VI, cl. 2; *Toll v. Moreno*, 458 U.S. 1, 9-10 (1982); *Youakim v. Miller*, 562 F.2d 483, 494 (7th Cir. 1977), *affd.* 440 U.S. 125; *Domar Enterprises, Inc. v. Southern National Bank of North Carolina, etc.*, 828 F. Supp. 1230 (W.D.N.C. 1993), *aff'd.* 64 F.3d 944.